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IN THE COURT OF APPEALS OF INDIANA

GORDON C. SCHAEFFER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0609-PC-729
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0001-CF-33

June 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Gordon Schaeffer, Jr., appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Schaeffer presents three issues, which we restate as follows:

I. Whether his post-conviction counsel's decision not to subpoena his trial counsel unfairly denied Schaeffer his right to confrontation;

II. Whether trial counsel provided effective assistance; and,

III. Whether Schaeffer's sentence was enhanced due to an improper aggravator or in violation of *Blakely v. Washington*, 542 U.S. 296 (2004).

Facts and Procedural History

The facts as set out in Schaeffer's direct appeal are as follows:

> [O]n January 12, 2000, undercover Kokomo Police Officer Thomas Hudson went to the home of Paige Pettit to discuss the purchase of some cocaine. Pettit told Officer Hudson that she could facilitate a deal between him and Gordon Schaeffer. Officer Hudson was told that Schaeffer would be at Pettit's home at approximately 4:30 that afternoon with one hundred and fifty dollars worth of cocaine. Officer Hudson called Pettit several times after 4:30 to see if Schaeffer had yet arrived. At 6:15 p.m., Officer Hudson returned to Pettit's home to wait for Schaeffer to arrive. At that time, the only individuals whom Officer Hudson saw in the home when he arrived were Pettit and Tommy West. Officer Hudson had two hundred dollars of marked buy money that had been photocopied for identification purposes. As Officer Hudson approached Pettit's home, Schaeffer also arrived. Officer Hudson entered the apartment, followed shortly by Schaeffer. Schaeffer asked Pettit if her son was home and then walked into the bedroom and bathroom as if he was looking for Pettit's son. Schaeffer and Pettit had a discussion about the purchase of a larger amount of cocaine. Schaeffer then walked out of the family room into a short hallway along the bedroom where he could not be seen by Officer Hudson. Pettit then rolled her wheelchair into the doorway to the hallway. During this time, West remained in the family room behind Officer Hudson. Officer

> Hudson then counted out one hundred and fifty dollars and gave it to Pettit. Pettit handed the money in the direction where Officer Hudson had last seen Schaeffer. Within a second or two, Pettit pulled her arm back from down the hallway and handed two rocks of cocaine to Officer Hudson. Almost immediately, Schaeffer was seen by Officer Hudson folding money and putting it into his pocket as he walked to the bathroom. Later, when Schaeffer was arrested, he had the marked buy money on his person.

Schaeffer v. State, No. 34A05-0104-CR-154, slip op. at 2-3 (Ind. Ct. App. Dec. 11, 2001). On February 15, 2001, a jury convicted Schaeffer of dealing in cocaine, a class B felony, and determined that he was a habitual offender. Appellant's App. at 6. He received a twenty-year sentence on the dealing offense, which was enhanced by twenty years as a result of the habitual offender finding. *Id.* at 7. A panel of this court affirmed Schaeffer's conviction. *Schaeffer*, slip op. at 2, 9.

On August 5, 2002, Schaeffer filed a pro se petition for post-conviction relief, alleging that his trial counsel was ineffective for failing to protect his Sixth Amendment rights at sentencing, failing to investigate the case and present an entrapment defense, and failing to object to inadmissible evidence. Shortly thereafter, the State filed a response. Schaeffer, by counsel, filed an amended petition for post-conviction relief in November 2004, and a second amended petition in February 2005. The State responded to each petition. On November 17, 2005, the post-conviction court held a hearing on the matter. Thereafter, both Schaeffer and the State submitted proposed findings and conclusions. In June 2006, the court issued its findings of fact and conclusions of law and denied Schaeffer's petition for post-conviction relief. App. at 17.

Discussion and Decision

Standard of Review

The well-settled standard for reviewing the denial of post-conviction relief follows.

> The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl* [*v. State*], 729 N.E.2d [102, 106 (Ind. 2000)] (quotation omitted). In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. *Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses.

Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004) (some citations omitted). Moreover,

> Post-conviction procedures do not afford a petitioner with a "super-appeal." *See, e.g.*, *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). Rather, subsequent collateral challenges must be based on grounds enumerated in Post-Conviction Rule 1. If an issue was known and available on direct appeal, but not raised, it is procedurally defaulted as a basis for relief in subsequent proceedings. *See, e.g.*, *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999). If an issue was raised on appeal, but decided adversely, it is res judicata. *Id*. If the issue is not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding, but as a general rule, "most free-standing claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata."

Williams v. State, 808 N.E.2d 652, 659 (Ind. 2004).

I. Post-conviction Counsel's Decision not to Subpoena Trial Counsel

Schaeffer faults his post-conviction attorney, Daniel K. Whitehead, for phoning trial counsel, Stephanie Doran, and submitting her affidavit at the post-conviction hearing rather than subpoenaing her. Schaeffer claims that Whitehead's failure to subpoena Doran denied him the opportunity to question her regarding: (1) her methods for investigating and making a determination not to present the entrapment defense; (2) her rationale for not moving for a directed verdict on the State's failure to prove beyond a reasonable doubt Schaeffer's predisposition to commit the charged offenses; and (3) her reasoning for failing to object to the imposition of an aggravated sentence based on erroneous sentencing factors and those not presented to the jury. Appellant's Br. at 5. For support, he cites cases, *inter alia*, *Young v. State*, 482 N.E.2d 246 (Ind. Ct. App. 1983), and *Whitlock v. State*, 456 N.E.2d 717 (Ind. Ct. App. 1983).

In *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005), our supreme court reiterated its approach to claims regarding performance by a post-conviction lawyer. The Court "observed that neither the Sixth Amendment of the U.S. Constitution nor article 1, section 13 of the Indiana Constitution guarantee the right to counsel in post-conviction proceedings, and explicitly declined to apply the well-known standard for trial and appellate counsel of" *Strickland v. Washington*, 466 U.S. 668 (1984). Citing *Baum v. State*, 533 N.E.2d 1200, 1200-01 (Ind. 1989), the *Graves* court noted that post-conviction pleadings are not regarded as criminal actions and need not be conducted under the standards followed in them. 823 N.E.2d at 1196. Indeed, the *Baum* court held that a claim of defective performance "poses no cognizable grounds for post-conviction relief" and that to recognize such a claim would sanction avoidance of legitimate defenses and

constitute an abuse of the post-conviction remedy. 533 N.E.2d at 1200-01. Instead, the proper standard is one based on principles inherent in protecting due course of law – one that inquires "if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court." *Id*. at 1201.

There is no indication of any inherent procedural unfairness during the post-conviction hearing at which Whitehead appeared and represented Schaeffer. Far from "abandoning" his client, Whitehead engaged in a lengthy examination of Schaeffer that permitted him to raise the various allegations of trial counsel ineffectiveness, sentencing issues, etc. *See Graves*, 823 N.E.2d at 1197. In addition, Whitehead introduced Doran's sworn affidavit, in which she confirmed both her status as an attorney and the fact that she was assigned to represent Schaeffer. The remainder of her affidavit provided:

> 3. I no longer have any independent recollection of the trial proceedings and trial strategy in this cause other than what appears in the record of the trial court proceedings.
> 4. I believe that I was competent in my representation of [Schaeffer].
> 5. I discussed the State's evidence with [Schaeffer] and explored all of the potential defenses available to him.

App. at 127. Given the content of Doran's affidavit, we cannot fathom, and Schaeffer does not demonstrate, how Doran's presence at the post-conviction hearing would have altered the outcome of Schaeffer's post-conviction proceeding.[1] More importantly, there is no indication of a violation of the principles inherent in protecting due course of law.

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[1] Schaeffer fails to include pinpoint cites for the cases he claims "mandate that counsel must be subpoenaed to the evidentiary hearing" or else the "post-conviction court may presume that trial counsel provided adequate legal representation." Appellant's Br. at 5-6. Our review of these cases reveals that they do not support his proposition and/or are clearly distinguishable. The court in *Whitlock* stated, "In regard to the defendant's failure to call his trial counsel as a witness at the post-conviction hearing, the

II. Effective Assistance of Trial Counsel

Schaeffer asserts that his trial counsel was ineffective for a variety of reasons. He contends that his counsel should have conducted a more thorough investigation, raised the entrapment defense, moved for a directed verdict, requested an instruction on entrapment, and objected to the sentence.[2]

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686. When called upon to find whether there was ineffective assistance of trial counsel, a post-conviction court uses the analysis outlined by the Court in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components.

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trial court would be justified in inferring that the trial counsel would not have corroborated the acts and omissions which led to the alleged inadequate representation." 456 N.E.2d at 718. However, no affidavit of counsel was submitted in *Whitlock.* In *Young*, the court stated, "An allegation of failure to consult with Defendant absent a showing of what Defendant would have provided the attorney that would have aided the preparation of his defense, does not establish a basis for relief for ineffective representation. In other words, Petitioner must show some harm due to counsel's failure to consult with him." 482 N.E.2d at 251. Again, no affidavit of counsel was introduced.

[2] Within this section of his brief, Schaeffer also raises sufficiency and hearsay concerns. Having been determined in his direct appeal, *Schaeffer*, slip op. at 3-6, these issues may not be rehashed in post-conviction proceedings. *See Sims v. State*, 771 N.E.2d 734, 738 (Ind. Ct. App. 2002) (discussing defendant's attempt to relitigate hearsay issue on post-conviction, and noting "issues litigated adversely to the defendant are res judicata"), *trans. denied*. As for the sentencing issue, we will examine it separately *infra*.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. "A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

Indiana Code Section 35-41-3-9 governs the defense of entrapment and provides:

> (a) It is a defense that:
> (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; *and*
> (2) the person was not predisposed to commit the offense.
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

(Emphasis added). In Indiana, the defense of entrapment turns upon the defendant's state of mind, or whether the criminal intent originated with the defendant. *Espinoza v. State*, 859 N.E.2d 375, 385 (Ind. Ct. App. 2006). Stated otherwise, the question is whether the government's deception actually implants the criminal design in the mind of an innocent person. *See id*. The State may rebut an entrapment defense either by proving beyond a reasonable doubt the defendant's predisposition to commit the crime or by disproving police inducement. *See Riley v. State*, 711 N.E.2d 489, 494 (Ind. 1999).

Schaeffer alleges that had trial counsel Doran conducted a "reasonable investigation, she would have uncovered evidence of concealed deals with the state's witness (Ms. Pettit) and misconduct by law enforcement." Appellant's Br. at 7. He

contends that the "trial record clearly indicated" that Schaeffer's illegal conduct "was a product of coercion by an agent of" the State. *Id*. However, Schaeffer fails to provide citations to the trial transcript. Moreover, although Schaeffer's appendix includes excerpts from the trial transcript, our review of these snippets reveals that they pertain to other matters. "On appeal from the denial of a petition for post-conviction relief, the burden is on the petitioner to provide a record adequate for review." *Lile v. State*, 671 N.E.2d 1190, 1193 (Ind. Ct. App. 1996). Without citations to relevant portions of the trial transcript, we are unable to address whether Schaeffer was "lured" by Pettit's phone calls into "allegedly selling drugs." Appellant's Br. at 8, 9.[3] Therefore, we cannot conclude that trial counsel was ineffective – let alone that post-conviction relief should have been granted.[4]

III. Sentence

Schaeffer makes a two-fold challenge to his sentence. First, he faults his trial counsel for not objecting to what he characterizes as the improper usage of an anti-drug-message as an aggravator. *See Gibson v. State*, 856 N.E.2d 142, 149 (Ind. Ct. App. 2006) ("It is axiomatic that a trial judge's desire to send a personal philosophical or political message is not a proper reason to aggravate a sentence."). Second, he cites *Blakely* and

[3] Interestingly, in arguing that Schaeffer was "clearly predisposed to sell cocaine and his conduct was not the result of law enforcement using persuasion or other means likely to cause him to engage in the conduct," the State uses pinpoint cites to the trial transcript. Appellee's Br. at 8. Thus, although we did not receive the original trial transcript on appeal from the post-conviction order, apparently, the State had access to it.

[4] The same lack of citation to the transcript precludes us from addressing Schaeffer's related contentions that his trial counsel was ineffective for: (1) not moving for a directed verdict based on lack of proof; and (2) for not requesting an entrapment instruction.

asserts, "the factors never submitted to the jury, set forth in the pre-sentence investigation report were used to enhance [his] sentence by ten (10) years, specifically so that the Court would send a message." Appellant's Br. at 13.

Our review of Schaeffer's sentence is hampered by the fact that neither the sentencing order nor the sentencing portion of the trial transcript has been included in the materials presented on appeal. Further, we have not been provided with a copy of the presentence investigation report. Likewise, an excerpt of the prosecutor's argument is notably absent. What does appear is the post-conviction court's order, which states:

> The sentence should not be reduced under *Blakely* nor under *Apprendi* due to the fact that the Court found one of the aggravating factors was [Schaeffer's] prior criminal record. In *Apprendi*, the Court found that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court found that his prior record was an aggravating factor and case law is clear in that it only takes one aggravating factor in order for a court to give the Defendant the maximum sentence.

App. at 19; Appellant's Br. at 18.

Both Schaeffer and the State agree that the trial court listed two aggravating circumstances: (1) Schaeffer's criminal record, and (2) the ineffectiveness of rehabilitation and probation. Appellant's Br. at 11-12; Appellee's Br. at 10. Schaeffer's brief, however, also includes the following, which he describes as a statement made by the trial court while imposing sentence:

> I think given the drug problem in this community I have an obligation to at least consider what's happening here. We're using children to sell and kids are starting to use and people's lives are being ruined and people are becoming well, as you. You had a problem with drug abuse your entire life. I can't remember the exact words but the Probation Department

> indicated that up until the time you were arrested on this you were using four or five drugs on a daily basis. So I believe that the fact that this was a sale in the community at this time is something that does need to be mentioned.

Appellant's Br. at 12 (no citation to transcript). The State does not dispute that the court "mentioned" that drugs were a problem in the community and that children were beginning to use drugs, but maintains that the trial court "did not consider this an aggravating factor" per se in Schaeffer's case. Appellee's Br. at 10. In view of the limited information presented on appeal, we cannot say that Schaeffer has shown otherwise.[5] Moreover, we are not left with a definite and firm conviction that a mistake has been made. As such, reversal of the post-conviction judgment is not warranted.

Affirmed.

BAKER, C. J., and FRIEDLANDER, concur.

[5] Even if the trial court had erroneously utilized the community drug problem as an aggravator, it appears that Schaeffer's criminal history was the determining factor in enhancing his sentence. In addition, even if *Blakely* were applicable in a case where the defendant did not raise sentencing issues on direct appeal of a conviction after trial, "[b]y its own terms, and as consistently recognized by our cases analyzing *Blakely*, an enhancement based upon criminal history does not trigger a *Blakely* analysis." *Dillard v. State*, 827 N.E.2d 570, 575 (Ind. Ct. App. 2005), *trans. denied.*